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Defining California Civil Code Section 47(3): The Resurgence of Self-Governance

Fred H. Cate*

In 1964, the United States Supreme Court ruled in *New York Times Co. v. Sullivan*¹ that a public official cannot recover damages for libel unless he proves that the alleged libel was published with knowledge of its falsity or with reckless disregard of its truth or falsity, a standard that the Court called "actual malice."² In the 1971 case, *Rosenbloom v. Metromedia, Inc.*,³ a plurality of the Court applied the *New York Times* standard of actual malice to a defamation action brought by a private individual where the allegedly defamatory story involved a matter of public interest.

Only three years later, the Court overruled *Rosenbloom* in *Gertz v. Robert Welch, Inc.*⁴ The Court held that where the plaintiff is a private individual, the level of constitutional protection that extends to publications by the media may be less than *New York Times* actual malice. *Gertz* allowed states to establish their own standards of liability, provided that liability was not imposed without regard to fault and that punitive damages were not awarded without proof of *New York Times* actual malice.⁵

States have responded to *Gertz* by creating a variety of standards of liability for libel actions involving private plaintiffs, ranging from negli-

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1. 376 U.S. 254, 283 (1964).

2. "Actual malice" is a troubling term throughout libel law. At common law, it referred to actual ill will, hatred, or spite. See, e.g., *Cherry v. Des Moines Leader*, 114 Iowa 298, 86 N.W. 323 (1901). In *New York Times*, however, the Supreme Court defined "actual malice" as "knowledge that it [the statement] was false" or "reckless disregard of whether it was false or not." 376 U.S. at 280.

Where the definition of "actual malice" is not clear from the context, this note will use the term "common law actual malice" to refer to actual ill will, hatred, or spite. This note will use the term "*New York Times* actual malice" to indicate the "knowledge of falsity or reckless disregard" standard.

3. 403 U.S. 29 (1971).

4. 418 U.S. 323 (1974).

5. *Id.* at 347-49. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985), the Supreme Court reinterpreted *Gertz* to apply only where the allegedly defamatory publication involves a matter of public interest.

gence to actual malice.⁶ California appears to be among those states adopting the latter standard. Some California courts have interpreted California Civil Code Section 47(3)⁷—which protects communications between “interested” persons—broadly to require proof of actual malice⁸ before allowing private individuals to recover for alleged libels involving matters of public interest.

The limits of the section 47(3) privilege, however, remain unclear, particularly in the absence of a California Supreme Court ruling involving the application of section 47(3) to the defamation of a private individual by a general readership publication.⁹ Where the defamatory statement concerns a public official or figure, and the publication is limited to an audience that has a legitimate interest in the conduct of that person, the privilege may apply.¹⁰ The more troubling area is where a private individual is defamed by a story published for a diverse audience. California appellate courts have divided on whether a publisher can share a sufficiently legitimate interest with a diverse audience for the section 47(3) privilege to apply when the person defamed is not a public official.

Given the United States Supreme Court's recent trend toward re-

6. Five states presently use a standard higher than negligence for a private plaintiff to recover for defamation where the defamatory statements were on a subject of public interest. Alaska, Colorado, Indiana, and New Jersey require a showing of *New York Times* actual malice. See *Gay v. Williams*, 486 F. Supp. 12 (D. Alaska 1979) (actual malice is probably Alaska's “minimum constitutional standard”); *Walker v. Colorado Springs Sun*, 188 Colo. 86, 538 P.2d 450 (1975), *cert. denied*, 423 U.S. 1025 (1975) (adopting *Rosenbloom*); *Aafco Heating & Airconditioning Co. v. Northwest Pubs., Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976) (actual malice is required for all cases involving “truth, science, morality and arts in general as well as responsible government”); *Dairy Stores v. Sentinel Pub. Co.*, 104 N.J. 125, 516 A.2d 220 (1986) (actual malice for matters of public interest). New York appears to require a showing of gross irresponsibility for a private plaintiff to recover where the defamatory statements involve a subject of legitimate public interest. See *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 379 N.Y.S.2d 61, 341 N.E.2d 569 (1975).

7. CAL. CIV. CODE § 47(3) (West 1982) provides:

A privileged publication or broadcast is one made . . .

...

3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information.

8. It is uncertain whether California courts applying § 47(3) require *New York Times* or common law actual malice. See notes 56, 99, 112, 153, 162 *infra* and accompanying text.

9. See *Institute of Athletic Motivation v. University of Illinois*, 114 Cal. App. 3d 1, 11, 170 Cal. Rptr. 411, 417 (1980) (§ 47(3) is not “capable of precise or categorical definition”); R. HEINKE & R. LEVY, *LITIGATING LIBEL AND INVASION OF PRIVACY CASES* 41 (1984) (“Whether there is a sufficient common interest between the mass media and its audience to make the qualified privilege of § 47(3) apply to the media is an unsettled question.”); Warren, Heinke, Sager & Hinueber, *Survey of California Libel and Privacy Law*, in LDRC 50 STATE SURVEY 67 (H. Kaufman ed. 1986) (“The extent to which section 47(3) protects the media is unsettled.”).

10. See notes 50-56 *infra* and accompanying text; see also *Maidman v. Jewish Publications, Inc.*, 54 Cal. 2d 643, 355 P.2d 265, 7 Cal. Rptr. 617 (1960).

stricting constitutional protection for free expression,¹¹ the expansion of California's statutory privilege has taken on new national significance. As the Supreme Court limits the protection offered by the first amendment, states must decide whether to compensate for the reduced federal protection of free expression through state constitutional provisions, statutes, and common law. California's public interest privilege offers one example of how states can protect expression that is at the heart of the first amendment.

This note explores the "public interest" extension of California's section 47(3) privilege. Part I explains the origins of the statute and its common law context. Part II examines the judicial expansion of the privilege and the current controversy regarding the privilege in California. Part III addresses the merits of an expanded privilege in light of the traditional first amendment justifications for free speech. The note concludes that although the privilege has been extended beyond its intended and traditional applications, its extension clearly responds to the first amendment interest in protecting speech that facilitates the public's participation in government and therefore should be adopted by the California Legislature or the California Supreme Court.¹²

I. SECTION 47(3) AND ITS COMMON LAW CONTEXT

A. *The Common Law Backdrop*

Prior to the United States Supreme Court's constitutionalization of libel law,¹³ courts had developed an elaborate common law of defamation. Except where overridden by constitutional concerns, common law continues to control most state libel actions.¹⁴ Under common law, the publisher of a libel was held strictly liable for any defamation that resulted. The plaintiff had to prove only the fact of publication and, in some cases,¹⁵ that her reputation had been damaged; the burden then shifted to the publisher-defendant. The publisher could defend on one

11. See *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 106 S. Ct. 2968 (1986) (articulating a less protective standard for commercial speech); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985) (limiting *Gertz* to communications on subjects of public interest). But see *Anderson v. Liberty Lobby*, 106 S. Ct. 2505 (1986); *Philadelphia Newspapers v. Hepps*, 106 S. Ct. 1558 (1986).

12. For a different perspective on the extension of § 47(3), see Scott, *Fair Comment in California: An Unwelcome Guest*, 57 S. CAL. L. REV. 173 (1983) (student author). Scott concludes that § 47(3), as applied in *Rollenhagen*, is "uncertain, if not unlimited, in scope." *Id.* at 175. The "strong need for simplicity and certainty in defamation law" necessitates that the extension should either be clarified and confirmed by the legislature or the courts, or be rejected in favor of a "single standard for liability of media defendants who publish defamatory articles about private citizens." *Id.* at 196-97.

13. See notes 1-5 *supra* and accompanying text.

14. M. FRANKLIN, *MASS MEDIA LAW* 109 (3rd ed. 1987).

15. Proof of damage to reputation was required for libel *per se*, but not for libel *per quod*. Libel *per se* refers to a publication that plainly, on its face, defames an identified individual; libel *per quod* requires that the reader know some extrinsic fact in order for the publication to be defamatory. See F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 5.9(A) (1986).

or more of only four grounds: truth, consent,¹⁶ absolute privilege, or conditional privilege. Conditional privilege formed the common law origin of California's section 47(3).

Conditional privileges protect those interests that are important to public policy, but not so vital that courts can avoid balancing them against an individual's reputational interests.¹⁷ Most conditional privileges apply to individuals. They protect communications involving the speaker's interest, the interest of the hearer or receiver of the information, and an interest held jointly between speaker and hearer.¹⁸ The two conditional privileges that have traditionally applied to the media are fair comment, which protects statements of opinion about public figures,¹⁹ and fair report, which protects fair and accurate reports of government proceedings.²⁰ To overcome a conditional privilege, the plaintiff must show that the publisher was motivated by common law actual malice—hatred, ill will, or spite—rather than by a desire to serve the interest that the privilege was designed to protect.²¹

California's section 47(3) evolved from two of the common law conditional privileges: common interest and fair comment.²² The common law common interest privilege protects communications made in good faith on any subject in which both the speaker and the hearer have an interest or duty.²³ The common interest privilege traditionally applied only to communications between parties sharing a family interest,²⁴ a business interest,²⁵ a professional interest,²⁶ or a religious

16. Truth and consent were absolute bars to recovery; they are not at issue here. For a discussion of these defenses see *id.* §§ 5.17, 5.20.

17. Absolute privileges, in contrast to conditional privileges, apply to those communications that are so important to public policy that they must be allowed whatever damage they may cause and despite any culpable intent on the part of the publisher. At common law, the defense of absolute privilege is available for statements made in court, official communications between high-level public officials, and statements made during legislative and administrative proceedings. See R. SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* § VI.2 (1980).

18. See *id.* § VI.3.

19. *E.g.*, public officials, artists, playwrights, authors. See *id.* § IV.3.4 and cases cited therein.

20. See *id.* §§ IV.3, VI.3.7.

21. See *id.* § VI.3.

22. See notes 29-39 *infra* and accompanying text.

23.

A communication made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which, without this privilege, would be actionable, and although the duty is not a legal one, but only a moral or social duty of imperfect obligation.

33 AM. JUR. *Libel and Slander* § 126 (1941).

24. See, *e.g.*, *Zanley v. Hyde*, 208 Mich. 96, 175 N.W. 261 (1919); *Brown v. Radebaugh*, 84 Minn. 347, 87 N.W. 937 (1901) (communication between relatives).

25. See, *e.g.*, *Philadelphia Wilmington & Baltimore R.R. v. Quigley*, 62 U.S. (21 How.) 202 (1858) (communications between a corporation and its stockholders); *Bufalino v. Maxon Bros., Inc.*, 368 Mich. 140, 117 N.W.2d 150 (1962) (communications between business partners).

26. See, *e.g.*, *Judge v. Rockford Memorial Hosp.*, 17 Ill. App. 2d 365, 150 N.E.2d 202 (1958) (communications between two doctors).

organizational interest.²⁷ The privilege of fair comment protects expressions of opinion about public officials, scientists, artists, composers, performers, authors, and other persons who place themselves or their work in the public eye.²⁸

B. *Origin of Section 47(3)*

The California Legislature enacted section 47 of the Civil Code in 1872, in an effort to codify existing common law absolute and conditional privileges. The conditional privileges of common interest and fair comment were embodied in section 47(3).²⁹

The legislative history of this Code section suggests that the Legislature intended to restate the common law.³⁰ The wording of section 47(3) is identical to that of section 31 in the original New York Civil Code (part of the famous "Field Code"), which was published in 1865 as a codification of the common law.³¹ In the comments following section 47(3), the California drafters cited to two New York cases addressing the common law conditional privilege of common interest.³² The first of these cases, *Thorn v. Moser*,³³ held that there is no recovery against a party who speaks in the performance of a duty—legal or moral, public or private—or in the assertion of his own rights or to protect his own interest, without proof of "express malice."³⁴ The drafters also cited *Lewis & Herrick v. Chapman*,³⁵ which held that (1) where a communication is made in answer to inquiries from one having

27. See, e.g., *Slocinski v. Radwan*, 83 N.H. 501, 144 A. 787 (1929) (communications between church members); *Creswell v. Pruitt*, 239 S.W.2d 165 (Tex. Ct. App. 1951) (communication between members of a religious association).

28. The defense of fair comment requires five elements:

1. The subject of the comment must be of public concern;
2. The comment must be based upon facts which are stated or are readily ascertainable by the public;
3. The facts must be true;
4. The comment must be entirely comment or criticism, not an allegation of fact; and
5. The comment must not be intended to harm another person.

See RESTATEMENT OF TORTS § 606 (1938).

The Restatement no longer recognizes the privilege of fair comment, since the Supreme Court has arguably extended absolute protection to statements of opinion. RESTATEMENT (SECOND) OF TORTS §§ 606-10 (1981); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." [footnote omitted]).

This does not eliminate the privilege, however, since a number of states have applied fair comment to protect certain statements of fact as well as opinion. See R. SACK, *supra* note 17, at § IV.3, IV.4.3.

29. See note 7 *supra*.

30. See Van Alstyne, *The California Civil Code*, in CAL. CIV. CODE 1-43 (West 1954).

31. N.Y. CIV. CODE § 31 (1865).

32. CAL. CIV. CODE ANN. § 47 annotation (Hammond & Burch 1872).

33. 1 Denio 488 (1844) (an action for slander based on the defendant's allegation that plaintiff forged a check).

34. *Id.* at 493.

35. 16 N.Y. 369 (1857) (an action for libel based on the defendant's implication that plaintiff had delayed paying a bill).

an interest in the information sought, or (2) where the relationship between the parties communicating is such as to make sharing the information reasonable, the communication will be privileged.³⁶

In addition to these cases, the drafters cited an 1859 treatise by Francis Hilliard on the common law of torts.³⁷ This treatise contains the traditional statement of the common law common interest privilege, taken from an 1855 English case, *Harrison v. Bush*.³⁸ The citation to these cases and to Hilliard's treatise, which set out the traditional understanding of the common interest privilege, indicates that the 1872 Code drafters intended to codify the common law common interest privilege.³⁹

Section 47(3) was later amended to bring its language into present tense and to remove gender-specific pronouns,⁴⁰ but the text is otherwise unchanged. Nonetheless, California courts have extended the section 47(3) privilege far beyond the drafters' apparent intent.

II. JUDICIAL INTERPRETATION OF SECTION 47(3)

In keeping with the drafters' intent, California courts have traditionally applied section 47(3) to a variety of special relationships: communications by an employer to its employees regarding the termination of a fellow employee,⁴¹ complaints to a local bar association about an unethical attorney,⁴² letters from an insurance company to a physician's patients explaining why their claims were being denied,⁴³ inquiries by a bonding company and creditors about a contractor's financial condition,⁴⁴ and complaints to a school principal by parents asserting misconduct by their children's teacher.⁴⁵ The courts, however, have also extended section 47(3) to apply beyond these traditional special relationships.

36. *Id.* at 374.

37. F. HILLIARD, *THE LAW OF TORTS OR PRIVATE WRONGS* (Boston 1859).

38. 5 El. & Bl. (Q.B.) 344, 119 Eng. Rep. 509 (1855). The *Harrison* court defined the privilege in these terms:

A communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminary matter which, without this privilege, would be slanderous and actionable.

Id. at 348, 119 Eng. Rep. at 512; see also F. HILLIARD, *supra* note 37, at 333-34.

39. The drafters cited to a third case, *Perkins v. Mitchell*, 31 Barb. 461 (1860), that involved two doctors' testimony regarding the plaintiff's sanity before a justice of the peace. This case implicated the common law privilege protecting communications made in judicial hearings, contained in § 47(4), not § 47(3).

40. 1874 ACTS AMENDATORY OF THE CODES, PASSED AT THE TWENTIETH SESSION OF THE LEGISLATURE, 1873-74 184.

41. See *Deaile v. General Tel. Co.*, 40 Cal. App. 3d 841, 115 Cal. Rptr. 582 (1974).

42. See *Katz v. Rosen*, 48 Cal. App. 3d 1032, 121 Cal. Rptr. 853 (1975).

43. See *Slaughter v. Friedman*, 32 Cal. 3d 149, 649 P.2d 886, 185 Cal. Rptr. 244 (1982).

44. See *Gantry Constr. Co. v. American Pipe & Constr. Co.*, 49 Cal. App. 3d 186, 122 Cal. Rptr. 834 (1975).

45. See *Martin v. Kearney*, 51 Cal. App. 3d 309, 124 Cal. Rptr. 281 (1975).

A. *The Extension of Section 47(3) to General Circulation Mass Media*

Beginning as early as 1921, section 47(3) was applied to media defendants, when the alleged libel was of sufficient interest to the public or a defined segment of the public to meet section 47(3)'s common interest requirement. In *Snively v. Record Publishing Co.*,⁴⁶ the California Supreme Court applied section 47(3) to a story imputing dishonesty to the Los Angeles police chief that was published in a general circulation newspaper. In 1942, the court of appeals in *Harris v. Curtis Publishing Co.*⁴⁷ applied section 47(3) to protect a story assailing the character of the chairman of the Laguna Beach school board, even though the story was printed in a national magazine. In 1946, in *Glenn v. Gibson*,⁴⁸ the court of appeals extended section 47(3) to protect an article that involved no public official, published in a general circulation newspaper. And in 1965, in *Williams v. Daily Review*,⁴⁹ the court of appeals again applied section 47(3) to a general circulation newspaper where no pre-existing or special interest relationship, or public official, was involved. These cases constitute a drastic expansion of the section 47(3) privilege. In each, the court relied on the importance of citizen participation in government to justify the extension.

In *Snively v. Record Publishing Co.*,⁵⁰ a newspaper's publication of a cartoon imputing dishonesty to the Los Angeles police chief was held to be protected by the section 47(3) privilege. The California Supreme Court held that a newspaper of general circulation "stands in such relation to the people of the community in which it is published and circulated that, with regard to publications therein concerning local public officers," it fits within section 47(3).⁵¹

The court stated that it held the privilege to apply because "the official conduct of public officers, especially in a government by the people, is a matter of public concern of which every citizen may speak in good faith and without malice."⁵² This theme—that self-governing people have the right to comment on the conduct of public officials—is present throughout the opinion. The court noted that it did not matter that the plaintiff was appointed rather than elected, since "[e]very citizen has the right to apply . . . for the removal of an unfit or corrupt officer."⁵³

46. 185 Cal. 565, 198 P. 1 (1921).

47. 49 Cal. App. 2d 340, 121 P.2d 761 (1942).

48. 75 Cal. App. 2d 649, 171 P.2d 118 (1946).

49. 236 Cal. App. 2d 405, 46 Cal. Rptr. 135 (1965).

50. 185 Cal. 565, 198 P. 1 (1921).

51. *Id.* at 571, 198 P. at 3.

52. *Id.* The interest that the *Snively* court is articulating has been characterized by Professor Blasi as the "checking value" of free speech, namely, the role that uninhibited speech can serve in checking the actions of government officials. See Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; see also notes 117-127 *infra* and accompanying text.

53. 185 Cal. at 572, 198 P. at 3.

The plaintiff had contended that since the published statements were false, protecting them served no role in allowing the public to fulfill its citizenry duties. The *Snively* court rejected this claim and noted that it had rejected similar reasoning in prior cases.⁵⁴ If truth were required for the privilege to attach, the privilege would be useless since true speech is, by definition, not libelous. Moreover, the court noted, the role of the public in bringing charges against officers is too important to allow liability for honestly believed statements that turn out to be false.⁵⁵ As long as the publisher believes that a public official has acted in a manner that reflects on his fitness for office, the publisher is not liable for bringing that behavior to the attention of the people served by the official.⁵⁶

The court of appeals again considered the extension of section 47(3) to a general circulation publication in *Harris v. Curtis Publishing Co.*⁵⁷ The court applied section 47(3) to protect a story impugning the character of the chairman of the Laguna Beach school board, even though the story was printed in a national magazine, the *Saturday Evening Post*.

The court's rationale was not that the plaintiff was a public official, but rather that he was involved in education and the statements attributed to him in the article, which he alleged constituted the defamation, dealt with public education. Had the article focused on the plaintiff's fitness for office, it would not have been privileged since it was published to a far larger audience than had a legitimate interest, or vote, in the Laguna Beach school board elections. Public education, on the other hand, is a subject in which the court noted all citizens could have a legitimate interest. "There is a marked distinction between the making of such a purely local attack and a comment upon political views and policies the effect of which cannot, from their very nature, be confined to any locality."⁵⁸

The court was careful not to limit its holding to cases involving elected officials or public education. Instead, the court referred to a publication "involving a matter of public policy or economic theory which, while arising in a local community, is directly connected with

54. *Id.* at 574-76, 198 P. at 3-5.

55. See notes 132-133 *infra* and accompanying text.

56. 185 Cal. at 576, 198 P. at 5.

The court noted that the plaintiff must prove "malice" on the defendant's part to overcome the privilege. The court defined "malice" as "a state of mind arising from hatred, or ill will, evidencing a willingness to vex, annoy, or injure another person." *Id.* at 577, 198 P. at 5 (quoting *Davis v. Hearst*, 160 Cal. 143, 160, 116 P. 530, 537 (1911)). The *Snively* court went on to note that this malice "may be inferred by the court or a jury where the charge is false and is libelous *per se* and the defendant publishes it without having probable cause for believing it to be true." *Id.* at 577, 198 P. at 5. The *Snively* court limited this inference of malice to cases involving libel *per se*. For a discussion of libel *per se*, see note 15 *supra*; see also F. HARPER, F. JAMES & O. GRAY, *supra* note 15, at § 5.9(A).

57. 49 Cal. App. 2d 340, 121 P.2d 761 (1942).

58. *Id.* at 350, 121 P.2d at 766.

and may vitally affect the habits, modes of living and economic views of people throughout the nation."⁵⁹

By 1946, section 47(3) was held to apply to a newspaper of general circulation where no public official was involved. In *Glenn v. Gibson*,⁶⁰ the court of appeals applied the conditional privilege of section 47(3) to a story published in a newspaper on local prostitution involving servicemen. The court stressed that the conduct of servicemen in a given community, especially in time of war, was "of vital concern to every right-thinking person" in that community.⁶¹ The court noted that, according to the Restatement of Torts, communications that "affect a sufficiently important public interest" are conditionally privileged.⁶² The court went on to quote the comments of the Restatement drafters on applying the privilege to communications that facilitate the public's role as active citizens.⁶³

In 1965, the court of appeals addressed section 47(3) in *Williams v. Daily Review*.⁶⁴ The *Daily Review*, an Alameda County newspaper, published an article criticizing delays by private engineering contractors in completing a city paving project. The court once again emphasized that the crucial issue in determining whether section 47(3) applied was whether the publication was made in the public interest. The court explained that "public interest" applied not only to matters involving public officials, but also to statements concerning private individuals where the subject matter was of public concern.⁶⁵ Reasoning that section 47(3) embodied the common law conditional privilege of fair comment, the *Williams* court indicated that public interest included

59. *Id.*

60. 75 Cal. App. 2d 649, 171 P.2d 118 (1946), *disapproved on other grounds*, Lipman v. Brisbane Elem. School Dist., 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961).

61. 75 Cal. App. 2d at 659, 171 P.2d at 124. The court noted:

[T]he complaint shows that the articles were published during times of war in a community where extensive war activities were being conducted, both civilian and military, and where the welfare of those engaged therein was a matter of vital concern to every right-thinking person. It would thus appear that the complaint on its face shows that said publications came within the meaning of subdivision 3 of section 47 of the Civil Code

Id.

62. *Id.* (quoting 3 RESTATEMENT OF TORTS § 598(a)).

63.

The rule stated in this Section is applicable when any recognized interest of the public is in danger, including the interest in the prevention of crime and the apprehension of criminals, the interest in the honest discharge of their duties by public officers, and the interest in obtaining legislative relief from socially recognized evils.

Id. at 660, 171 P.2d at 125-25 (quoting 3 RESTATEMENT OF TORTS § 598(a)).

64. 236 Cal. App. 2d 405, 46 Cal. Rptr. 135 (1965).

65.

[C]ontrary to plaintiffs' contention, the scope of the term "public interest" in California is not limited to matters relating solely to public officials. Both the cases of *Glenn* and *Maidman* applied the privilege to statements defaming private individuals, where the subject matter of the article was determined to be of public interest or the defamed individual of renown among a certain interest group.

Id. at 417, 46 Cal. Rptr. at 143.

"qualifications or conduct of public officers or candidates for office" and "the manner in which public . . . institutions are administered," as well as "the work of independent contractors which is being paid for out of public funds and the work of employees of such contractors."⁶⁶

In California, then, even before the Supreme Court's decision in *Rosenbloom*, where a publication involved a matter of public interest, the standard for recovering for libel was common law actual malice.⁶⁷ Public interest included not only the conduct and qualifications of public officials, but also a broad variety of issues relating to the role of the public as citizens—voters, advisors, monitors, initiators, and critics. The *Gertz* Court's retreat from *Rosenbloom* removed the constitutional basis for *Rosenbloom*'s requirement of *New York Times* actual malice in cases involving public interest and private plaintiffs; the Court, however, left states free to establish, or retain an already established, actual malice standard—be it *New York Times* or common law malice. Thus, *Gertz* reaffirmed the constitutionality of the judicial expansion of section 47(3).

B. *The Current Confusion over Section 47(3): Rancho La Costa, Rollenhagen, and Dalitz*

Beginning in 1980, the California appellate courts reconsidered the application of section 47(3) to general circulation media in three cases. In the first, *Rancho La Costa, Inc. v. Superior Court of Los Angeles County*,⁶⁸ the court of appeals held that the privilege did not apply to a story in *Penthouse Magazine* about organized crime figures in California. In 1981, a different panel of the court of appeals held in *Rollenhagen v. City of Orange*⁶⁹ that section 47(3) protected the broadcast of an auto mechanic's arrest for fraud. Finally, in 1985, the court of appeals again considered the *Rancho La Costa* facts in *Dalitz v. Penthouse*.⁷⁰ The court reasserted that the section 47(3) privilege did not apply. The differing results in these cases, the variety of rationales that each panel of the appellate court applied, and the absence of a recent California Supreme Court ruling have left the limits of section 47(3) shrouded in confusion and controversy.

1. *Rancho La Costa.*

More than a decade passed after *Gertz* was decided before the Cali-

66. *Id.* (quoting 3 RESTATEMENT OF TORTS § 607).

67. See note 56 *supra*; note 112 *infra*.

68. 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 (1980), *aff'd in part, rev'd in part*, *Dalitz v. Penthouse Int'l*, 168 Cal. App. 3d 468, 214 Cal. Rptr. 254 (1985), *cert denied*, 450 U.S. 902 (1985).

69. 116 Cal. App. 3d 414, 172 Cal. Rptr. 49 (1981).

70. 168 Cal. App. 3d 468, 214 Cal. Rptr. 254 (1985). Part I of the court's opinion in *Dalitz* was not certified for publication in the official reporter, but has been republished at 11 Med. L. Rptr. (BNA) 2153 (1985).

fornia courts had an opportunity to decide whether California was going to follow the Supreme Court in retreating from the *New York Times* actual malice requirement in cases where a private individual was defamed by a story on a matter of public interest. In 1980, the court of appeals addressed the question in *Rancho La Costa, Inc. v. Superior Court of Los Angeles County*.⁷¹ The case involved an article in *Penthouse Magazine* that charged that the owners of the Rancho La Costa resort were members of organized crime. The court of appeals focused on whether the topic of the article was of sufficient interest to *Penthouse's* audience to qualify the article for the section 47(3) privilege.

The court began, in line with earlier cases, by noting that section 47(3) does not apply to stories dealing with only "general public interest" or the "mere general or idle curiosity of the general readership of newspapers and magazines."⁷² Instead, the court initially concluded, the interest involved must be a "pecuniary or proprietary interest," such as that shared by parties related by a "contractual, business or similar relationship."⁷³ The court sought to distinguish previous applications of the privilege as involving either a public official⁷⁴ or a "local or special interest group,"⁷⁵ thereby denying that a public interest, involving no contractual or business relationship, would qualify a publication for section 47(3) protection. This narrow interpretation of the interest or relationship required to invoke the section 47(3) privilege led the court to conclude that the privilege would not apply to an article published to a "vast audience in a national magazine."⁷⁶ The court held that the present case did not qualify for the protection of section 47(3).

2. Rollenhagen.

The following year, the court of appeals addressed another case in which a private individual was allegedly defamed by a publication on a subject of public interest. *Rollenhagen v. City of Orange*⁷⁷ involved a suit brought by an auto mechanic against CBS after network affiliate KNXT broadcast a segment showing the arrest of plaintiff for fraud in his auto

71. 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 (1980).

72. *Id.* at 664-65, 165 Cal. Rptr. at 359.

73. *Id.* at 665, 165 Cal. Rptr. at 359.

74. *Id.* at 666-67, 165 Cal. Rptr. at 360. The court cited to *Snively v. Record Publishing Co.*, 185 Cal. 565, 198 P. 1 (1921), *Harris v. Curtis Publishing Co.*, 49 Cal. App. 2d 340, 121 P.2d 761 (1942), and *Everett v. California Teachers Association*, 208 Cal. App. 2d 291, 25 Cal. Rptr. 120 (1962).

75. *Rancho La Costa*, 106 Cal. App. 3d at 667, 165 Cal. Rptr. at 360. The court cited to *Maidman v. Jewish Publications*, 54 Cal. 2d 643, 355 P.2d 265, 7 Cal. Rptr. 617 (1960), *Brewer v. Second Baptist Church*, 32 Cal. 2d 791, 197 P.2d 713 (1948), *Toney v. State*, 54 Cal. App. 3d 779, 126 Cal. Rptr. 869 (1976), *Williams v. Daily Review*, 236 Cal. App. 2d 405, 46 Cal. Rptr. 135 (1965), *Glenn v. Gibson*, 75 Cal. App. 2d 649, 171 P.2d 118 (1946), and *Heuer v. Kee*, 15 Cal. App. 2d 710, 59 P.2d 1063 (1936).

76. *Rancho La Costa*, 106 Cal. App. 3d at 665, 165 Cal. Rptr. at 359.

77. 116 Cal. App. 3d 414, 172 Cal. Rptr. 49 (1981).

repair business. CBS asserted that the broadcast was privileged under section 47(3). The court of appeals agreed, concluding that free speech principles are paramount to the privacy rights of public and private plaintiffs, so long as the subject matter is of public interest and there is no malice.⁷⁸

The plaintiff argued that the Supreme Court's retreat in *Gertz* from *Rosenbloom's* requirement of *New York Times* actual malice for publications on topics of public interest should lead California to relax its section 47(3) actual malice standard as well. The court rejected this argument, noting that the *Gertz* decision specifically left states free to continue requiring *New York Times* or common law actual malice. California's section 47(3) actual malice standard "predates *Gertz* by over 50 years and the only impact the *Gertz* decision has on the standard is to decree it a constitutionally acceptable one."⁷⁹

3. Dalitz.

In 1985, the *Rancho La Costa* facts again reached the court of appeals. In *Dalitz v. Penthouse*,⁸⁰ two of the Rancho La Costa resort's officers appealed the trial court's determination that they were public figures. The court, with two of its three judges having heard the original *Rancho La Costa* case, rendered a 2-part opinion. The first part of the opinion again dealt with section 47(3), but was not certified for publication.⁸¹

The court noted the confusion that had resulted from the conflict between *Rancho La Costa* and *Rollenhagen*, and attempted to distinguish the two. The *Dalitz* court indicated that the immediacy of the events in *Rollenhagen* and the presence of an eyewitness warranted more protection than did the *Rancho La Costa* situation.⁸²

The court appeared to recognize that the section 47(3) privilege extends beyond *Rancho La Costa's* requirement that the allegedly defamatory matter concern a "pecuniary or proprietary interest," public official, or special interest shared by a defined group or association. Instead, *Dalitz* acknowledged that section 47(3) may apply where the public has a legitimate interest in the subject of the defamatory arti-

78.

Beginning with *Snively v. Record Publishing Co.* . . . the California courts have recognized basic fair [sic] speech principles as paramount over plaintiffs whose status might be private or public, so long as there was no malice, and the subject matter was one of public interest

. . . .

. . . If an individual becomes involved in a matter of public interest, whether he is famous, infamous, or unknown, should be irrelevant

Id. at 420-22, 172 Cal. Rptr. at 52-53 (citations omitted). In referring to "fair speech," the *Rollenhagen* court probably meant "free speech."

79. *Id.* at 422, 172 Cal. Rptr. at 53.

80. 168 Cal. App. 3d 468, 214 Cal. Rptr. 254, 11 Media. L. Rep. (BNA) 2153 (1985).

81. 11 Media L. Rep. at 2153.

82. *Id.* at 2156.

cle.⁸³ The court, however, would clearly apply a limited interpretation of "public interest."⁸⁴ *Penthouse's* article, although dealing with organized crime and racketeering, apparently did not come within the *Dalitz* court's definition of "public interest."

4. *The conflict between the courts.*

Each of the three panels of the court of appeals invoked different views of section 47(3). The *Rancho La Costa* court believed the privilege was intended to protect only contractual or pecuniary interests.⁸⁵ The court interpreted the judicial expansion of the privilege to reach only as far as public officials or narrowly defined special interest groups. The court cited to *Snively v. Record Publishing Co.*⁸⁶ in the first category, and *Glenn v. Gibson*⁸⁷ and *Williams v. Daily Review*⁸⁸ in the second. The court ignored *Harris v. Curtis Publishing Co.*⁸⁹ As a result, *Rancho La Costa* found that the "strictly limited statutory qualified privilege is inapplicable to a defamatory article published at large to a vast audience in a national magazine."⁹⁰

The *Rancho La Costa* court did not explain why it accepted the most dramatic expansion of section 47(3) in *Snively*—to apply to general circulation media—and yet was unwilling to follow the public interest rationale that prompted that expansion to its logical conclusion. The *Rancho La Costa* court's determination that section 47(3) could never apply to an article published to a vast audience in a national magazine excludes from protection an article discussing the fitness for office of a national official, such as the President, even though the subject is within the legitimate interest of people throughout the nation. The court's arbitrary line, separating national media published to a vast audience from all other forms of media, seems to contradict the *Rancho La Costa* court's acceptance of *Snively's* extension of section 47(3) to protect articles dealing with public officials. The line also ignores the further extensions of section 47(3) by *Glenn* and *Williams*, which *Rancho La Costa* cited, and *Harris*, which *Rancho La Costa* failed to note.

The *Rancho La Costa* court's distinction between an article published "at large to a vast audience in a national magazine" and an article published to "a local or special interest group and related to matters of special concern," creates an inequitable and unworkable rule. The identical story could be run in two publications, intended for the same

83. *Id.* at 2157.

84. *Id.*

85. 106 Cal. App. 3d at 665, 165 Cal. Rptr. at 359.

86. 185 Cal. 565, 198 P. 1 (1921).

87. 75 Cal. App. 2d 649, 171 P.2d 118 (1946).

88. 236 Cal. App. 2d 405, 46 Cal. Rptr. 135 (1965).

89. 49 Cal. App. 2d 340, 121 P.2d 761 (1942).

90. 106 Cal. App. 3d at 665, 165 Cal. Rptr. at 359. For detailed criticism of the *Rancho La Costa* court's reliance on precedent, see Heinke, *Does Section 47(3) Protect the Press?*, L.A. Daily J., Sept. 2, 1981, at 4, col. 4.

audience, and yet under *Rancho La Costa* one publication might qualify for the protection of section 47(3) while the other would not. For instance, in *Maidman v. Jewish Publications*,⁹¹ the California Supreme Court applied section 47(3) to a story about a leader in the Los Angeles Jewish community, published to a primarily Jewish audience. Under *Rancho La Costa*, that same story, if published in the *Los Angeles Times* to a diverse audience, would not be privileged under section 47(3). Such a distinction yields troubling results; yet the court in *Rancho La Costa* offers no justification for this discrimination against general circulation media.

In a passage that sheds light on its restrictive view of section 47(3), the *Rancho La Costa* court went on to discuss generally the relationship of the first amendment to section 47(3). The court indicated that in a defamation action, the "right of privacy is paramount to the right of free speech."⁹² Whatever the plaintiff's "right of privacy" may be—and that remains uncertain—the *Rancho La Costa* court ignored the Supreme Court's decisions in *New York Times*⁹³ and *Gertz*⁹⁴ when it penned this passage, since these and numerous subsequent Supreme Court cases held the right of free speech, even where that speech was false and defamatory, to be paramount to the public plaintiff's privacy interests absent a showing of *New York Times* actual malice.

The court in *Rollenhagen* read section 47(3) as embodying the traditional common law conditional privilege of fair comment.⁹⁵ Therefore, the court reasoned, the privilege applied as long as the subject matter of the publication was of "public interest" and the statements were published without malice. The *Rollenhagen* court cited to *Snively* and *Glenn*, among other cases, for the proposition that "California courts have recognized basic fair [sic] speech principles as paramount over plaintiffs whose status might be private or public, so long as there was

91. 54 Cal. 2d 643, 7 Cal. Rptr. 617 (1960).

92.

Under the mandate of recent federal Supreme Court rulings, the right of privacy is paramount to the right of free speech when in the exercise of free speech a defendant violates another's privacy by uttering a defamatory lie about him. The right of free speech guaranteed by the state and federal Constitutions does not permit violation of the right of privacy. . . . Whatever privilege is accorded defendants under Civil Code section 47(3), it must yield to the plaintiffs' constitutional rights of privacy.

Id. at 667, 165 Cal. Rptr. at 360.

93. 376 U.S. 254, 281 ("occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great") (quoting *Coleman v. MacLennan*, 78 Kan. 711, 724, 98 P. 281, 286 (1908)).

94. 418 U.S. 323, 342. The *New York Times* actual malice standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test.

Id.

95. 116 Cal. App. 3d at 420, 172 Cal. Rptr. at 52.

no malice, and the subject matter was one of public interest."⁹⁶

The court gave no definition for the term "public interest." It turned to the issue only when it discussed the inconsistency between the present case and *Rancho La Costa*, and was only able to conclude that the *Rancho La Costa* definition of public interest was "broad enough to encompass the case at bench."⁹⁷ The court noted that fraud in the auto repair business had been the subject of extensive legislative attention.⁹⁸ Given that the article in *Rancho La Costa* concerned organized crime and racketeering—also the subject of extensive state and federal legislation—one can only assume that had the *Rollenhagen* court been presented with the *Rancho La Costa* facts, it would have held section 47(3) to apply.⁹⁹

The *Rollenhagen* court also discussed the plaintiff-based standards established by *New York Times* and *Gertz* that defined the level of protection according to the status of the plaintiff. *Rollenhagen* noted that California had chosen to accept the latitude granted the states in *Gertz* by continuing to accord speech on topics of public interest a high standard of protection through section 47(3).¹⁰⁰ "If an individual becomes involved in a matter of public interest, whether he is famous, or unknown, should be irrelevant; there is no cogent reason to subject the press to a varying standard of liability because of the subject's status."¹⁰¹

The *Dalitz* court, which included two of three judges who had decided *Rancho La Costa*, noted the confusion that had resulted from the conflict between *Rancho La Costa* and *Rollenhagen*, and attempted to distinguish the two. The *Dalitz* court indicated that the immediacy of the events in *Rollenhagen* and the presence of a witness willing to make a statement for the CBS cameras warranted more protection than did the *Rancho La Costa* situation.¹⁰² The *Dalitz* court did not, however, explain

96. *Id.*

97. *Id.* at 426, 172 Cal. Rptr. at 56.

98. *Id.*

99. The court in *Rollenhagen* briefly touched on the issue of which standard of actual malice—common law or *New York Times*—would be required to defeat the privilege in §§ 47(3) and 47(4):

The trial court further stated, "We also find as a matter of law that there is no evidence whatsoever of malice in this case on the part of either defendant whether we use the term 'malice' in the constitutional sense applied by the United States Supreme Court in *Gertz* [i.e., *New York Times* actual malice] or as defined in the Civil Code 48(a)4. . . ."

Id. at 428-29, 172 Cal. Rptr. at 57.

100. See notes 4-6 *supra* and accompanying text; note 147 *infra*.

101. 116 Cal. App. 3d at 422, 172 Cal. Rptr. at 53.

102.

In *Rollenhagen* . . . a specific event of public interest took place which CBS then reported. *Rollenhagen* was being taken from his place of business in handcuffs, and his former customer had come to his place of business and was making a statement to CBS on film at their request. . . . By contrast, in the instant case, none of the plaintiffs were being led away from *Rancho La Costa* in handcuffs. No one had come forward to *Penthouse* or any specific person as a percipient witness to any wrongdoing-

why. One explanation may be that the court felt the *Rollenhagen* facts bore closer resemblance to the traditional one-to-one application of section 47(3) than did those in *Rancho La Costa*. The California Supreme Court indicated as early as 1921, however, that the privilege need not be limited to a one-on-one or narrow special interest group situation.¹⁰³

The *Dalitz* court acknowledged that section 47(3) may apply where the public has a legitimate interest in the subject of the article.¹⁰⁴ The court further noted that matters of "legitimate public concern" had traditionally been limited to "activities of public officials and political candidates, managers of public institutions or of private institutions that substantially affect the public, independent contractors compensated with public funds, and to public performances or exhibitions by musicians, actors, athletes, artists and authors."¹⁰⁵

This interpretation of public interest includes the traditional public figures, comments about whom are protected by the fair comment privilege. It seeks to identify the speech that is important to society by focusing on *who* is swept up in that speech, rather than *what* the speech is about. This is a fundamental difference between *Rollenhagen* and *Dalitz*; the plaintiff-based standard was rejected by *Rollenhagen* in the passage quoted above.¹⁰⁶ The actual speech that each court would seek to protect with section 47(3) may not be that different; but the standards by which the courts identify what communications warrant protection obviously are.

Both courts looked to "public interest." *Dalitz* sought to define the scope of public interest by referring to the identity of the plaintiff. *Rollenhagen* specifically rejected this approach, choosing instead to focus on the content of the communication and the degree to which the communication fell within the legitimate interest of the audience, as participants in the government process, in receiving it.¹⁰⁷ The subject matter approach, which *Rollenhagen* employed, comports more closely with the California courts' rationale for applying section 47(3) to statements published in general circulation media.¹⁰⁸ As discussed in Part III, that approach also is more in line with the important first amendment interest in fostering a free flow of the information necessary for a democ-

ing by any of the plaintiffs in *Rancho La Costa* and given reports which Penthouse could then have quoted directly in its article.

11 Media L. Rep. at 2156.

103. In *Snively v. Record Publishing Co.*, 185 Cal. 565, 198 P. 1 (1921), the court had protected the publication of a cartoon imputing dishonesty to the Los Angeles police chief in a general circulation newspaper on the basis that a large part of the newspaper's readership, as citizens, had a legitimate interest in the subject. See notes 50-56 *supra* and accompanying text.

104. 11 Media L. Rep. at 2157.

105. *Id.* (quoting Scott, *supra* note 12, at 180).

106. See note 101 *supra* and accompanying text.

107. See notes 97-101 *supra* and accompanying text.

108. See notes 46-66 *supra* and accompanying text.

racy.¹⁰⁹ Finally, *Rollenhagen's* content-based standard is less subject than the *Dalitz* plaintiff-based standard to the many problems that have attended the application of the *New York Times/Gertz* plaintiff-based standard.¹¹⁰ The *Rollenhagen* court, however, did not define "public interest." The court failed to provide guidance for either other courts or potential litigants about what communications are likely to be protected by section 47(3).¹¹¹ As discussed in Part III, in order to realize the benefits of the content-based approach that *Rollenhagen* followed, a more systematic expression of the definition and limits of the self-governance standard is necessary.

The precise limits of section 47(3) remain unclear after these three cases. Certainly, where a special relationship exists between the publisher and the audience, the privilege applies. Where the publication concerns a public official or figure, and the publication is limited to an audience that has a legitimate interest in the conduct of that person, the privilege may also be held to apply, even where the communication is published in the general circulation media. Courts are most troubled when a private individual is defamed by a story on a topic of public interest published in the media to a diverse audience. Courts have focused on a variety of the following factors: the importance of the audience's interest, the specificity of the event, the speed with which the public needed to know of its occurrence, and the portion of the audience that had a legitimate interest.¹¹²

III. RESOLVING THE JUDICIAL DISPUTE OVER SECTION 47(3) AND "PUBLIC INTEREST"

Section 47(3) potentially offers publishers considerable protection from libel actions by public and private plaintiffs where the publication concerns a matter of public interest. Public interest has not been authoritatively defined.¹¹³ Nonetheless, the courts that have extended

109. See notes 117-27 *infra* and accompanying text.

110. See notes 138-145 *infra* and accompanying text.

111. The *Rollenhagen* court's lack of guidance about how § 47(3) should be applied has not prevented other courts from following *Rollenhagen's* lead. See *Stevens v. Rifkin*, 608 F. Supp. 710, 733 (N.D. Cal. 1984) (court held that, following *Rollenhagen*, statements broadcast by ABC affiliate KGO-TV to the effect that plaintiffs had shot a police officer were in the "public interest" as required by § 47(3)); *Beasley v. Hearst Corp.*, 11 Media L. Rep. (BNA) 2067 (Cal. Super. Ct. 1985) (court held that misidentification of plaintiff as suspect in murder manhunt in local newspaper was protected under § 47(3)).

112. It also remains unclear precisely what standard of actual malice is required in California to defeat the § 47(3) privilege. According to § 48(a)(4), the common law actual malice standard is required, but the *Snively* court's interpretation of that standard, which allows actual malice to be inferred where the statement is false and the defendant lacks probable cause for believing it to be true, is quite similar to the *New York Times* "knowledge of falsity or reckless disregard of the truth" standard. 185 Cal. 565, 577, 198 P. 1, 6 (1921). As argued below, the *New York Times* actual malice standard, to the extent it differs from the § 48(a)(4) standard as applied by California courts, is preferred. See note 153 *infra*.

113. Public interest clearly encompasses more than just subjects directly relating to the conduct of public officials; otherwise, the *Rollenhagen* and *Dalitz* courts would not have had to

section 47(3) to protect statements made in the general circulation media to a diverse audience have consistently stressed the public's interest in knowing about issues that are relevant to the public's role as citizens. This extension responds closely to the most important and most widely accepted first amendment rationale for protecting speech: self-governance.

A. *The First Amendment and Self-Governance*

The traditional justifications for the first amendment's protection of speech and press divide into four categories: self-fulfillment,¹¹⁴ safety-valve,¹¹⁵ marketplace of ideas,¹¹⁶ and self-governance.¹¹⁷ Of these cat-

go beyond *Rancho La Costa's* restrictive interpretation of the privilege, which included applying the privilege to stories about public officials. *Rancho La Costa*, 106 Cal. App. 3d at 666, 165 Cal. Rptr. at 360.

It is equally clear that public interest must not include all matters about which the public is interested or curious, since this would effectively create a carte blanche privilege for the media.

114. The self-fulfillment rationale for free expression is a notion of natural right or ability: People have a natural ability and desire to think freely and to express themselves freely. "Hence suppression of belief, opinion, or other expression is an affront to the dignity of man, a negation of man's essential nature." T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970). To legally protect this ability is not only morally important, but also practically beneficial to society as a whole. Individuals would be repressed and frustrated by limitations on their free expression. They would not develop themselves or their ideas as fully; therefore, they would contribute less to society. Moreover, to limit man's "search for truth, or his expression of it, is to elevate society and the state to a despotic command over him and to place him under the arbitrary control of others." *Id.*; see also Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

115. The safety-valve rationale was articulated by Justice Brandeis, who wrote in *Whitney v. California* that those who fought for American independence believed that:

[I]t is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

274 U.S. 357, 375 (1927) (Brandeis, J., concurring). By limiting the ability of an individual to convince others of his ideas through spoken or written advocacy, laws curbing free expression encourage discontent and violence. See T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 11-15 (1966). "Suppression of opposition may well mean that when change is finally forced on the community it will come in more violent and radical form." *Id.* at 12.

116. The marketplace of ideas rationale for protecting free expression is that society benefits from an uninhibited exchange of ideas. John Locke wrote:

[T]he business of laws is not to provide for the truth of opinions For the truth certainly would do well enough if she were once left to shift for herself She is not taught by laws, nor has she any need of force to procure her entrance into the minds of men [I]f truth makes not her way into the understanding by her own light, she will be but the weaker for any borrowed force violence can add to her.

J. LOCKE, *A LETTER CONCERNING TOLERATION* 45-46 (P. Romanell ed. 1955) (1st ed. 1689); see also J. MILL, *ON LIBERTY* 18, 28-29 (D. Spitz ed. 1975) (1st ed. 1859).

The marketplace of ideas rationale does not require believing that truth will always triumph over falsehood. Rather, part of the justification stems from the idea that truth is not always easily recognized, and that truth may arise out of what was once perceived as falsehood. It is therefore important that all speech—whether viewed as true or false—be placed before the public. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to

egories, the California courts have relied on the self-governance rationale when extending section 47(3) to protect general readership publications.

According to the self-governance rationale, the first amendment protects unfettered free speech because in a democratic society the public must have all information necessary to "govern." Alexander Meiklejohn, one of the most outspoken proponents of the self-governance rationale, has written that a democratic society which depends on its members to be both citizens and rulers must be open to discussion about and criticism of government, allowing even for "arguments against our theory of government."¹¹⁸

Meiklejohn advances three arguments for applying the first amendment to "those activities of thought and communication by which we 'govern.'"¹¹⁹ First, Meiklejohn argues that the first amendment's prohibition of restrictions on speech stems from the fundamental principle that "We, the People" are sovereign and therefore responsible for governing.¹²⁰ "All constitutional authority to govern the people of the United States belongs to the people themselves, acting as members of a corporate body politic."¹²¹

Second, Meiklejohn contends, the people have given only limited authority, through the Constitution, to "subordinate agencies" that carry on part of the business of governing. The people have not delegated all of their power. In the Constitution, they have provided for the direct exercise of some of their power, through voting.¹²² In this light, Meiklejohn refers to the public as an integral part of the government, as essential for the legitimate, orderly functioning of government

believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . .").

117. See T. EMERSON, *supra* note 115, at 8-11; M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 1.02(H) (1984).

118. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 65-66 (1948).

Shall we, then, as practitioners of freedom, listen to ideas which, being opposed to our own, might destroy confidence in our form of government? Shall we give a hearing to those who hate and despise freedom, to those who, if they had the power, would destroy our institutions? Certainly, yes! . . . We listen, not because they desire to speak, but because we need to hear. If there are arguments against our theory of government, our policies in war or in peace, we the citizens, the rulers, must hear and consider them for ourselves. That is the way of public safety. It is the program of self-government.

Id.

119. Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.

120. James Madison, in the report that accompanied the Virginia Resolutions of 1798, wrote in opposition to the Alien and Sedition Acts: "The people, not the government, possess the absolute sovereignty." 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 569 (1876). In the debate over the passage of the Acts in the House of Representatives, Madison added: "the censorial power is in the people over the Government, and not in the Government over the people." 4 ANNALS OF CONG. 974 (1794).

121. Meiklejohn, *supra* note 119, at 253.

122. See, e.g., U.S. CONST. art. I, § 2.

as the legislative, executive, and judicial branches.¹²³ In addition, Meiklejohn notes that the people have also reserved powers as provided by the tenth amendment.¹²⁴

Finally, Meiklejohn and many commentators argue, an uninhibited flow of information relating to self-governance is practically essential if the public is to exercise its function of electing and advising public officials.¹²⁵

The importance of speech relating to self-governance and its centrality to the first amendment are virtually unchallenged. Considerable controversy surrounds the definition of "self-governance" and the extent to which the first amendment protects speech that does not involve self-governance.¹²⁶ But there is broad consensus on the basic thesis that self-governance speech is not only within the first amendment's protection; it is at the core of that protection.

The vital importance of self-governance speech has run through many United States Supreme Court opinions. The Court has repeatedly asserted that:

expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." There is a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open."¹²⁷

123. Meiklejohn, *supra* note 119, at 253-56. For more on the proposition that the very structure of the government created by the Constitution requires that speech about self-governance be unfettered, see Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 23 (1971):

The first amendment indicates that there is something special about speech. We would know that much even without a first amendment, for the entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment.

Id.

124. Meiklejohn, *supra* note 119, at 253-54. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

125. See note 126 *infra*.

126. See generally A. BICKEL, *THE MORALITY OF CONSENT* (1975) (first amendment interest in self-governance protects speech that serves to make the political process work through lawful means); A. MEIKLEJOHN, *supra* note 118; BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978) (limiting first amendment protection to political speech, but asserting that nonpolitical speech may be protected as well to assure that no political speech is chilled); Blasi, *supra* note 52 (first amendment protects speech necessary for the press to serve its role in checking the actions of government officials); Bork, *supra* note 123 (first amendment protects only speech dealing "explicitly and specifically and directly with politics and government"); Meiklejohn, *supra* note 119 (to foster the public's role as self-governing citizens, the first amendment protects speech on all topics necessary to that role, including education, philosophy, science, literature, and the arts).

127. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (citations omitted); see also Carey v. Brown, 447 U.S. 455, 467 (1980); Mills v. Alabama, 384 U.S. 214, 218-19

One of the most difficult problems with the self-governance rationale is determining what is included in the term "self-governance." Certainly the public acts and statements of elected officials and candidates are included,¹²⁸ but what about the acts and statements of appointed officials, or private acts of public officials, or subjects tangential to officials' public acts, such as topics warranting their or the voters' attention? The self-governance rationale should also protect communication of this information because it directly relates to the public's role in government, including selecting, advising, and criticizing representatives.¹²⁹

The conduct of an appointed official often bears directly on the responsibilities of an elected official. The action or inaction of an elected official in reviewing, censuring, or removing an appointed official who is derelict in his duties is relevant to whether the elected official should be returned to office. The private acts of an elected official are also relevant to her fitness for office. Voters need to know whether the official has a record of dishonesty, lack of moral character, or illegal conduct in order to cast their ballots wisely.¹³⁰

Events that are tangential to the government official's duties should also be brought before the voters. Are there important issues that the official is ignoring, or of which she is not aware? Is the official pursuing her duties efficiently, and considering the least costly and least intrusive methods of solving identified problems? If the term "self-governance" did not reach to such areas, it would be useless as a rationale for the first amendment's protection of speech. A public official could remove a topic from the realm of protected public discourse simply by avoiding it. The term "self-governance" must also apply to those communications necessary for the public to initiate, evaluate, criticize, and vote on ballot referenda and initiatives, since these are constitutional means through which the public participates in government.¹³¹

(1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964); *Roth v. United States*, 354 U.S. 476, 484 (1957) (the first amendment was "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people"); *Stromberg v. California*, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

128. See *Buckley v. Valeo*, 424 U.S. 1, 14 (1976); *Mills*, 384 U.S. at 218.

129. The Supreme Court in *New York Times* referred to the "citizen-critic" and his "duty to criticize." 376 U.S. at 282 (emphasis added).

130. The Supreme Court in *Gertz* noted that "the public's interest extends to 'anything which might touch on an official's fitness for office. . . . Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.'" 418 U.S. at 344-45 (citations omitted) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964)).

131. See *BeVier*, *supra* note 126, at 358 ("the need to protect political speech fully in

The thrust of the self-governance rationale is that the citizenry must have all of the information necessary to choose, monitor, and advise its representatives intelligently, as well as to propose, discuss, and vote on ballot issues. If those who try to bring that information before the public are held liable for their errors, they will be less likely to communicate the information in the first place.¹³² For this reason, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters."¹³³

B. *Line-Drawing and the First Amendment*

Defining precisely what is to be protected under the rubric of "self-governance" is an arduous and largely unobtainable goal, but this does not mean that the task of line-drawing can be avoided. Line-drawing in a number of first amendment areas—such as obscenity,¹³⁴ pornography,¹³⁵ and commercial speech¹³⁶—has proved difficult, but it has nonetheless been unavoidable. The most simple and predictable line to draw is an arbitrary one that disregards first amendment interests and the practical demands of administering a democracy. Courts, however, are constrained by the first amendment. The search for where to draw the boundary lines of any privilege requires a balance between the certainty of the arbitrarily drawn line and the subtlety that first amendment interests dictate.¹³⁷

practice may justify the Court's extending first amendment protection to categories of speech other than the strictly political").

132. The Supreme Court addressed this issue in *New York Times*:

The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." As Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." . . . [E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive . . ." "The protection of the public requires not merely discussion, but information. . . . Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. . . . Whatever is added to the field of libel is taken from the field of free debate."

376 U.S. at 271-72 (citations omitted).

133. *Gertz*, 418 U.S. at 341.

134. See *Bethel School Dist. No. 403 v. Fraser*, 106 S. Ct. 3159 (1986); *Brockett v. Spokane Arcades*, 472 U.S. 491 (1985); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Miller v. California*, 413 U.S. 15 (1973); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Roth v. United States*, 354 U.S. 476 (1957).

135. See *Jenkins*, 418 U.S. at 153; *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 106 S. Ct. 1172 (1986).

136. See *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 106 S. Ct. 2968 (1986); *Lowe v. Securities and Exch. Comm'n*, 472 U.S. 749 (1985); *Bolger v. Young's Drug Prods.*, 463 U.S. 60 (1983); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

137. On the difficulty of drawing lines generally in the first amendment area, Robert Bork wrote:

Not too much should be made of the undeniable fact that there will be hard cases. Any theory of the first amendment that does not accord absolute protection for all verbal expression, which is to say any theory worth discussing, will require that a

In the defamation area, the *New York Times/Butts*¹³⁸/*Gertz* distinction between public officials, public figures, and private persons has proved unclear and has yielded bizarre results.¹³⁹ In *Gertz*, the Court claimed to "have no difficulty in distinguishing among defamation plaintiffs,"¹⁴⁰ but that task has not turned out to be so easy.¹⁴¹ Marc Franklin has argued that the *Gertz* approach has produced anomalous results,¹⁴² it has proved hard to administer,¹⁴³ and it offers little guidance to publishers as to what will and will not be found to be libelous.¹⁴⁴ "All of these consequences," writes Franklin, "flow from the Court's attempt to avoid the natural approach—one based on granting highest protection to speech about self-governance."¹⁴⁵

Drawing lines based on content between subjects of legitimate public interest and subjects that are not of public interest is also a difficult

spectrum be cut and the location of the cut will always be, arguably, arbitrary. The question is whether the general location of the cut is justified. The existence of close cases is not a reason to refuse to draw a line and so deny majorities the power to govern in areas where their power is legitimate.

Bork, *supra* note 123, at 28.

138. The U.S. Supreme Court in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), extended the requirement of actual malice, which *New York Times* had applied to public officials, to public figures.

139. See Branson & Sprague, *The Public Figure—Private Person Dichotomy: A Flight From First Amendment Reality*, 90 DICK. L. REV. 627 (1986); Franklin, *Constitutional Libel Law: The Role of Content*, 34 UCLA L. REV. — (1987) (forthcoming).

140. 418 U.S. at 344.

141. Compare *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976) (Johnny Carson held to be a public figure) and *Burnett v. National Enquirer, Inc.*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983) (Carol Burnett held to be a public figure) with *Jenoff v. Hearst Corp.*, 644 F.2d 1004 (4th Cir. 1981) (police informant charged with breaking into attorney's office held to be private) and *Lawrence v. Moss*, 639 F.2d 634 (10th Cir.), *cert. denied*, 451 U.S. 1031 (1981) (political advisor to Senate candidate held to be private). The Supreme Court itself has had considerable difficulty with the public/private plaintiff distinction. See, e.g., *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). See generally Franklin, *supra* note 139.

142.

[The *Gertz* Court's] desire to avoid analyzing content protects speech about alleged encounters between famous people in restaurants more than it protects discussions about the political behavior of the aides and supporters of candidates in elections.

In the usual First Amendment case it was unthinkable that self-governance speech would wind up *less* protected than "other" speech. In libel cases that is precisely what has happened in some cases.

Franklin, *supra* note 139, at — (footnotes omitted).

143. Professor Franklin notes the difficulty that lower courts face regarding the definition of public figure. "In some cases, the courts, realizing that the plaintiff must be found 'public' in order for the actual malice standard to apply, have stretched to hold 'public' many lower-level government employees, such as elementary school teachers, police, and others." *Id.* at — (footnotes omitted).

144.

[I]t is important that the speakers know the rules in advance. As matters now stand, it is increasingly difficult for editors or publishers or their lawyers to predict whether a court will determine a plaintiff to be public or private. . . . Surely editors would be in a much better position to determine accurately whether speech implicates "self-governance."

Id. at — (footnotes omitted).

145. *Id.* at —.

task. It is important, however, since it allows courts to tailor liability for defamation based on how directly the topic of the publication responds to first amendment interests.

Moreover, after the Supreme Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,¹⁴⁶ courts may be required to consider whether the speech in question involves an issue of public interest. The Supreme Court in *Gertz* allowed states to adopt their own standards, so long as they did not impose liability without fault, or punitive damages without proof of *New York Times* actual malice.¹⁴⁷ In *Dun & Bradstreet*, however, the Court redefined *Gertz* to require courts once again to investigate whether the defamation of a private person involved a subject of public interest. The Court held that the *Gertz* requirement of *New York Times* actual malice for awards of punitive damages applied only where the story at issue concerned a subject of public interest.¹⁴⁸ The publications of *Dun & Bradstreet*—a financial reporting service—did not qualify. After *Dun & Bradstreet*, it seems inevitable that state courts, hearing defamation actions brought by private plaintiffs, will have to consider whether the defamatory communication was on a subject of legitimate public interest.

The more clearly the line delimiting legitimate public interest can be drawn, the more helpful it will be for both potential litigants and courts. A clear privilege increases the publisher's ability to predict what will be actionable libel, and the potential plaintiff's ability to determine whether his case is likely to succeed at trial. Moreover, a more clearly defined privilege allows courts to decide more cases as a matter of law through pretrial motions, thereby saving both parties the high cost of litigation.¹⁴⁹

Thus, even though line-drawing in the first amendment area has proved difficult, it is unavoidable. The goal of courts drawing those lines should be to make them correspond as closely as possible to first amendment interests, without making them impossible to administer equitably and efficiently. After *Dun & Bradstreet*, it is clear that whatever

146. 105 S. Ct. 2939 (1985).

147. *Gertz*, 418 U.S. at 347-48 (footnote omitted) ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.").

148. *Dun & Bradstreet*, 105 S. Ct. at 2944-46.

149. The Supreme Court in *New York Times* commented on the high cost of litigation and its effect on the media:

Under such a rule [strict liability, with defendant required to prove truth], would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

376 U.S. at 279 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). See Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV 1 (1983).

plaintiff-based standards exist as a result of *New York Times/Butts/Gertz*, courts are also going to have to draw lines based on content. As they do so, courts should seek to avoid the clumsily arrived at, and often inequitable, results of the plaintiff-based standard.¹⁵⁰

C. Proposed Interpretation

Section 47(3)—as it has been judicially expanded—responds to the self-governance rationale for protecting free speech. By protecting publishers who bring to the public's attention issues that directly relate to the public's role as citizens, section 47(3) encourages the activity that the Supreme Court has repeatedly found to be at the heart of first amendment values.¹⁵¹

For the privilege to respond as closely as possible to the most important justifications for free speech, the term "public interest" should be defined to include subjects that directly contribute to the public's ability to carry out its role in a democracy. This includes the communications necessary to evaluate candidates' fitness for office; to monitor and criticize government officials; to inform and advise elected representatives; and to initiate, evaluate, and vote on ballot issues.¹⁵² Public interest should not be limited to specific events, nor should it be inapplicable to a national publication, where the subject of the publication is in the public interest of a national audience. On the other hand, the privilege should not protect stories that, while they may be interesting to members of the public, do not enhance their abilities as citizens.¹⁵³

While earlier discussions have tried to describe this standard in terms of what the role of an active citizen in a democracy entails, some examples of applications of the standard might clarify what it would and would not protect. Under the self-governance standard, the section 47(3) privilege would protect allegations in a Los Angeles newspaper—whether in a cartoon or an editorial—that the Los Angeles police chief is unfit for duty.¹⁵⁴ Section 47(3) would apply to stories¹⁵⁵ in a

150. See notes 1-5 & 138 *supra* and accompanying text.

151. See note 127 *supra* and accompanying text.

152. See notes 128-131 *supra* and accompanying text.

153. For plaintiffs to overcome the privilege, courts require a showing of *New York Times* actual malice. This would be a change from the definition of "actual malice" provided in § 48(a)(4), which defines the term to mean hatred, ill will, or spite. The *Snively* court, however, has already indicated that common law actual malice in California may be inferred where the statement is false and the defendant lacked probable cause for believing it to be true; this parallels *New York Times*' "knowledge of falsity or reckless disregard of the truth" standard. See notes 56 & 112 *supra* and accompanying text. The change would make California's common law standard conform with the *New York Times* constitutional standard. Courts considering cases where both *New York Times* or *Gertz* and § 47(3) were invoked would only have to make one determination as to whether there is evidence of "actual malice."

154. See *Snively*, 185 Cal. 565, 198 P. 1 (1921).

155. The extent to which a story must deal with self-governance, or the degree to which one statement dealing with self-governance might protect other statements in the same story that are unrelated to self-governance, is unclear. Obviously, the press must be prevented from using § 47(3) to protect otherwise actionable defamation by adding a tangential refer-

local paper about the regulation of prostitution and/or the conduct of military personnel based in that locale.¹⁵⁶ The privilege would also apply to criticism of city-funded contractors published in that city's newspaper.¹⁵⁷

Section 47(3) would protect a television broadcast about the illegal business practices of an auto mechanic in the broadcast station's viewing audience.¹⁵⁸ The privilege would also protect the publication in a national newspaper or magazine of an investigative report alleging that a real estate development project was a front for organized crime.¹⁵⁹ This is a more difficult case than the earlier examples, because the regulation of the resort arguably falls within the self-governance interest of a county or state. However, given the federal government's activities in regulating organized crime, the fact that organized crime extends beyond county or state borders, and the legitimate interest of every citizen in the prevention of crime and the apprehension of criminals, the section 47(3) privilege would seem to protect the article, even when published to a national audience.

The scope of section 47(3)'s protection is not limitless. Stories about Johnny Carson's personal life¹⁶⁰ or Carol Burnett's activities in a Washington restaurant¹⁶¹ would not be protected. A San Francisco gossip column report about a corrupt Los Angeles police chief would probably also not be protected, because the San Francisco readership has little legitimate interest in the Los Angeles police chief's fitness for office. If that same story dealt with an innovative crime fighting program that the Los Angeles police chief had begun, its publication in a San Francisco or even a national newspaper would arguably be protected by section 47(3). In all of these cases, proof of actual malice would defeat the California privilege.¹⁶²

The exact boundaries of the privilege are still not plain, but there is a standard—self-governance—against which the case-by-case decisions can be measured and about which there is more consensus on interpretation than with the “general public interest” standard announced in

ence to a self-governance interest. One possibility is to consider whether the part dealing with self-governance was intrinsic to the subject of the story or whether it was added merely to insulate unrelated defamatory statements. Another possibility is to consider whether the defamatory statements, taken by themselves, would independently come within the self-governance interpretation of § 47(3).

156. See *Glenn*, 75 Cal. App. 2d 649, 171 P.2d 118 (1946), *disapproved on other grounds* *Lipman v. Brisbane Elem. School Dist.*, 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961).

157. See *Williams*, 236 Cal. App. 2d 405, 46 Cal. Rptr. 135 (1965).

158. See *Rollenhagen*, 116 Cal. App. 3d 414, 172 Cal. Rptr. 49 (1981).

159. See *Rancho La Costa*, 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 (1980), *aff'd in part, rev'd in part*, *Dalitz v. Penthouse Int'l*, 168 Cal. App. 3d 468, 214 Cal. Rptr. 254, *cert. denied*, 450 U.S. 902 (1985).

160. See *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976).

161. See *Burnett v. National Enquirer, Inc.*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983).

162. If that actual malice is *New York Times* actual malice, such a showing would defeat the federal constitutional protection as well.

Rosenbloom and rejected in *Gertz*. Moreover, as more cases are decided in which the scope of "public interest" is defined, the application of section 47(3) will become easier, and the results are likely to be more uniform.

Section 47(3) offers California courts the opportunity—to the extent allowed by *Gertz*—to move beyond the *New York Times/Butts/Gertz* plaintiff-based approach, which has yielded anomalous and unpredictable results and has proven difficult to administer. Such a move comports with *Dun & Bradstreet's* requirement that courts hearing defamation actions brought by private plaintiffs consider whether the allegedly defamatory statements involved a subject of public interest. By applying the public interest requirement of section 47(3) to communications that provide the public with the information necessary to choose, monitor, and advise their representatives intelligently, as well as to propose, discuss, and vote on ballot issues, California courts can reach the optimal balance between a clearly defined standard and one that directly serves central first amendment interests.

CONCLUSION

Section 47(3) of the California Civil Code was originally enacted as a codification of the common law of libel's conditional privilege protecting communications between parties sharing a special interest. The courts, beginning in 1921 with *Snively v. Record Publishing Co.*,¹⁶³ extended the section 47(3) privilege to protect communications published in the media to a diverse audience, where the subject of the communications was within the legitimate public interest of the audience. Section 47(3) was subsequently interpreted to protect a broad range of statements published in the general media to a diverse audience. Three 1980s court of appeals cases—*Rancho La Costa*, *Rollenhagen*, and *Dalitz*—however, have left the limits of the privilege unclear.

This note has argued for recognition by the California Supreme Court or California Legislature of a more expansive interpretation of section 47(3). Under this broader reading, the privilege would apply to all media, regardless of the status of the plaintiff, so long as the publication served a role in providing the public with the information necessary to choose, monitor, and advise their representatives intelligently, as well as to propose, discuss, and vote on ballot issues. This application responds to the first amendment interest in protecting communications that help the public better participate in government. It encourages publishers and broadcasters to engage in this activity by providing them with a high level of protection, and helps all parties avoid the soaring costs of going to trial. On the other hand, this standard protects the public from abuse of the privilege by prohibiting its

163. 185 Cal. 565, 198 P. 1 (1921).

application where the alleged defamation does not involve an issue concerning self-governance. It limits the privilege to precisely those types of communications that the Supreme Court has stressed the first amendment is designed to protect.